No. 89-9

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1989

HAMMER DeROBURT,

Petitioner,

v.

GANNETT COMPANY, INC., a Delaware corporation, and GUAM PUBLICATIONS, INC., a Hawaii corporation, both doing business as "PACIFIC DAILY NEWS,"

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Hammer DeRoburt, President of the Republic of Nauru,[1] the victim of a false accusation of criminal activity, presents the following questions for review:

1. Should *New York Times v. Sullivan,* 376 U.S. 254 (1964), be overruled?

2. Should the holding of *New York Times* be modified so as to shift the burden of proof on the issue of "actual malice" to the defendant and to prohibit reliance upon lack of "actual malice" in cases where the defendant has withheld, concealed, or destroyed relevant evidence on the issue?

3. In a case where a trial judge has, as a discovery sanction, established a presumption from which an inference of "actual malice" may be drawn, is it reversible error for the court to revoke, on the eve of trial, the earlier order establishing the presumption, after the key witness in the case, one of the supposed sources of the false and defamatory publication, has died?

4. Did the trial court erroneously grant a directed verdict in favor of a parent corporation engaged in the newspaper business, where there was substantial evidence that a subsidiary

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[1] "Nauru is an independent island nation approximately eight and one-half square miles in area with a population of about 4000 citizens. Because of its vast deposits of phosphate, Nauru is among the wealthiest nations, per capita, in the world." *DeRoburt v. Gannett Company, Inc.*, 83 F.R.D. 574 (1979) (footnote 1). It is located in the Pacific Ocean between Hawaii and Australia.

corporation and its individual employees were agents of the parent corporation?

An affirmative answer to any of the first three of these questions would result in a determination of liability in favor of President DeRoburt, since a jury has found that the charges published by the defendants were false and defamatory. The fourth question presents the issue of whether both of the defendants should be held liable, or only Guam Publications, Inc.

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Constitutional and Other Provisions Involved 2

Statement of the Case 3

1. The False Accusation of Criminal Activity 3
2. The Commencement of Litigation 4
3. The Source Disclosure Order 6
4. The Order Establishing a Presumption That There Were No Sources 6
5. The "Act of State" Digression 8
6. The Decision on "Costs" 8
7. The Abrupt Reversal of the Presumption That There Were No Sources 9
8. The Trial 10
9. The Cryptic Decision of the Ninth Circuit 13

Basis of Federal Jurisdiction 14

Argument

I.

The *New York Times* Case Should Be Overruled, Because It Allows Uncompensated Damage to Reputation, and Because It Creates an Artificial and Unworkable Rule of Law That is Not Reasonably Calculated to Protect the Proper Exercise of Freedom of the Press 15

II.

If It Is Preserved At All, the "Actual Malice" Rule Should At Least Be Modified, Shifting the Burden of Proof to the Defendant and Limiting the Defendant's Reliance on the Purity of His State of Mind to Cases Where the Defendant

Has Not Withheld, Concealed, or Destroyed Evidence Concerning That State of Mind 22

III.

The Trial Court Erred in Its Interpretation of Federal Law Governing Discovery Proceedings When It Abruptly Revoked Its Earlier Ruling Establishing a Presumption That There Were No Sources, Depriving the Plaintiff of the Only Viable Method of Proving "Actual Malice," and the Ninth Circuit Erred in Affirming the Ensuing Judgment 26

IV.

The Ninth Circuit Erred in Upholding the Directed Verdict in Favor of Gannett, Since There Was Sufficient Evidence to Find That Gannett's Subsidiary, Guam Publications, Inc., and Its Individual Employees, Acted As the Agents, Servants, and Employees of the Parent Company 28

V.

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases Page

Allstate Finance Corporation v. Zimmerman, 330 F.2d 740 (5th Cir. 1964) 25
Anglo-Eastern Bulkships v. Ameron, Inc., 556 F.Supp. 1198 (S.D.N.Y. 1982) 28
Botos v. Los Angeles County Bar Association, 151 Cal.App.3d 1083 (1984) 29
Branzburg v. Hayes, 408 U.S. 665 (1972) 22-23
Browne v. McDonnell Douglas Corp., 698 F.2d 370 (9th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983) 28
Burns v. New York, 6 A.D.2d 30, 174 N.Y.S.2d 192 (1958) 28
Campbell v. United States, 365 U.S. 85 (1961) 24
Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974) 28
Coughlin v. Westinghouse Broadcasting and Cable, Inc., 476 U.S. 1187 (1986) 18, 23
DeRoburt v. Gannett Company, Inc., 83 F.R.D. 574 (D.Haw. 1979) ..... i, 2, 4
DeRoburt v. Gannett Company, Inc., 507 F.Supp. 880 (D.Haw. 1981) 2, 6
DeRoburt v. Gannett Company, Inc., 551 F.Supp. 973 (D.Haw. 1982) 2, 8
DeRoburt v. Gannett Company, Inc., 548 F.Supp. 1370 (D.Haw. 1982) 2, 8
DeRoburt v. Gannett Company, Inc., 558 F.Supp. 1223 (D.Haw. 1983) 2, 9
DeRoburt v. Gannett Company, Inc., 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) 2, 8
DeRoburt v. Gannett Company, Inc., 859 F.2d 714 (9th Cir. 1988) 2, 13

Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 17
Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975) 23
Garrison v. State of Louisiana, 379 U.S. 64 (1964) 15-16
Harte-Hanks Communications, Inc. v. Connaughton, ____ U.S. ____ (June 22, 1989) 16
Hawley v. Alaska Steamship Co., 236 F.2d 307 (9th Cir. 1956) 28
Herbert v. Lando, 441 U.S. 153 (1979) 17, 18, 23
Hodgson v. Hotard, 436 F.2d 1110 (5th Cir. 1971) 25
International Union (UAW) v. National Labor Relations Board, 459 F.2d 1329 (D.C. Cir. 1972) 25
Japan Petroleum Co. v. Ashland Oil, Inc., 456 F.Supp. 831 (D.Del. 1978) 29
Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 435 N.Y.S.2d 556, 416 N.E.2d 557 (1980) 28
Keyes v. School District No. 1, 413 U.S. 189 (1973) 24
Laxalt v. McClatchy, 622 F.Supp. 737 (D.Nev. 1985) 23
McPhaul v. United States, 364 U.S. 372 (1960) 24
Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980) 23
National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 27
Newton v. National Broadcasting Company, Inc., 109 F.R.D. 522 (D.Nev. 1985) 24
New York Times v. Sullivan, 376 U.S. 254 (1964) ..... passim
Pacific Can Co. v. Hewes, 95 F.2d 42 (9th Cir. 1938) 28, 29
PATCO v. Federal Labor Relations Authority, 685 F.2d 547 (D.C. Cir. 1982) 25

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 1134 (1986) 19, 23
Professional Seminar Consultants, Inc. v. Sino American Technology Exchange Council, Inc., 727 F.2d 1470 (9th Cir. 1984) 26
Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) 23
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) 16
St. Amant v. Thompson, 390 U.S. 727 (1968) 16
United States v. Fleischman, 339 US. 349 (1950) 24
United States v. Sumitomo Marine and Fire Insurance Company, 617 F.2d 1365 (9th Cir. 1980) 27
United States v. Westinghouse Electric Corporation, 648 F.2d 642 (9th Cir. 1981) 26
Williams v. American Broadcasting Companies, Inc., 96 F.R.D. 658 (W.D. Ark. 1983) 23
Wyle v. R. J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983) 26

Statutes

Restatement 2d of Agency
§ 247 28

28 U.S.C.
section 1254(1) 2
section 1332(a)(2) 14

Rules

Federal Rules of Civil Procedure
Rule 37 ..... 2, 6
Rule 37(b)(2) 26

Other Authorities

Epstein, "Was *New York Times v. Sullivan* Wrong?," 53 University of Chicago Law

Review 782 (1986) 18, 19
Note, "The Overconstitutionalization of Libel Law: *Philadelphia Newspapers, Inc. v. Hepps,*" 36 De Paul Law Review 391 (1987) 19
Lewis, "*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment,'" 83 Columbia Law Review 603 (1983) 19
Renata Adler, Reckless Disregard (1986) 20, 22

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner Hammer DeRoburt, President of the Republic of Nauru, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit from which review is sought is reported as *DeRoburt v. Gannett Company, Inc.*, 859 F.2d 714 (9th Cir. 1988). A copy of the decision it is annexed as Appendix A to this petition.

Prior to the decision of the Ninth Circuit, affirming the judgment of the trial court in favor of the defendants, there were six previous reported decisions in this case. They are *DeRoburt v. Gannett Company, Inc.*, 83 F.R.D. 574 (D.Haw. 1979); *DeRoburt v. Gannett Company, Inc.*, 507 F.Supp. 880 (D.Haw. 1981); *DeRoburt v. Gannett Company, Inc.*, 548 F.Supp. 1370 (D.Haw. 1982); *DeRoburt v. Gannett Company, Inc.*, 551 F.Supp. 973 (D.Haw. 1982); *DeRoburt v. Gannett Company, Inc.*, 558 F.Supp. 1223 (D.Haw. 1983); and *DeRoburt v. Gannett Company, Inc.*, 733 F.2d 701 (9th Cir. 1984). All seven of the reported *DeRoburt* decisions are discussed in the statement of the case below, as they reflect the plaintiff's eleven year odyssey through the courts of this country.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was handed down and entered on October 11, 1988. Plaintiff filed a petition for rehearing, which was ultimately denied on April 6, 1989. [Appendix B.] This court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This petition involves the First and Fourteenth Amendments to the Constitution of the United States,

insofar as they restrict the law of defamation. Also involved is Rule 37 of the *Federal Rules of Civil Procedure*. The relevant text of each of these provisions is set forth in Appendix C.

STATEMENT OF THE CASE

The story begins in 1978 with the publication, in the tradition of yellow journalism, of two articles in the *Pacific Daily News*, a Gannett newspaper, on the island of Guam. The first article, under the headline "Marshalls Separatist Movement Gets Secret Funds From Nauru," was written by Mr. Cisco Uludong, and was published on May 30, 1978. [Appendix D.] The second follow up article came out on June 29, 1978, and was written by another reporter, Mr. Paul Addison. [Appendix E.]

1. The False Accusation or Criminal Activity.

In the article by Mr. Uludong, it was asserted that the Republic of Nauru was "secretly" supporting the "separation of the Marshalls from Micronesia," by helping to finance a political campaign "to reject the proposed Micronesian constitution." It was further claimed that President Hammer DeRoburt "gave the separatists $600,000 of the $1 million they originally requested." This charge was attributed to unidentified "sources." The article further stated that the separatists' leaders in the Marshall Islands had originally been turned down, but that they renewed their request for a loan after President DeRoburt took office, and that he "approved it and flew to the Marshalls to personally deliver the check." The $600,000 loan was characterized as "illegal."

Mr. Addison's subsequent article reported that "Nauruan officials reacted angrily" to the first article, but the accusations previously made were repeated. The

second article did, however. characterize President DeRoburt as "well respected" and as the man "who was largely responsible for securing political independence for Nauru in 1968."

2. The Commencement of Litigation.

Plaintiff Hammer DeRoburt, acting in his individual capacity, brought a defamation action in federal court in Hawaii against the Gannett Company, Inc., and one of its subsidiaries, Guam Publications, Inc., based on what had been printed in the *Pacific Daily News* about him. The defendants promptly moved for dismissal and for summary judgment, but the motions were denied. *DeRoburt v. Gannett Company, Inc.*, 83 F.R.D. 574 (D.Haw. 1979).

With respect to the choice of law issue that was relevant to the motion to dismiss, the court found that sufficient evidence had been presented to support the application of Nauru law, but only insofar as it did not conflict with the First Amendment to the Constitution of the United States, as interpreted in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which established the "actual malice" rule. 83 F.R.D. at 582-583. The court noted that, in opposing the summary judgment motion, the plaintiff had submitted affidavits which tended to prove that the defendants' newspaper articles were false in four respects. 83 F.R.D. at 583. In particular, first of all, the plaintiff was described as being President of Nauru at the time of the loan in question, but in fact the loan had been made the day before he was elected. Secondly, President DeRoburt was alleged to have personally delivered money to the Marshall Islands, but in fact he did not even go to the Marshall Islands between March and June of 1978, and was not in any way involved with the loan. Thirdly, the loan was reported to be

"secret," but actually was a matter of "public record" in Nauru. Fourth and finally, it was alleged that the loan had been made in the Marshall Islands, but it was actually made in Nauru. 83 F.R.D. at 583.

In support of their motion for summary judgment, the defendants argued that the plaintiff's case could not survive summary judgment unless the plaintiff offered evidence that the articles about him had been published with "actual malice." 83 F.R.D. at 583. The court examined the opposition to the summary judgment and concluded that there was sufficient evidence on the subject to deny summary judgment, including proof of personal bias on the part of Mr. Uludong, the fact that Mr. Uludong had displayed "a pattern of biased and inaccurate reporting," the showing of a failure to adequately investigate the facts contained in the first article, and republication of the defamatory charges after the newspaper had been "informed by a reliable source that the information contained therein was erroneous." 83 F.R.D. at 583-585.

Citing a decision of the Hawaii Supreme Court, the district judge in the first reported *DeRoburt* decision noted that, in a defamation case involving a public official, summary judgment for the defendant may be granted where the defendant shows, through uncontroverted evidence, that the publication in question had been made without deliberate falsification, and without a high degree of awareness of the probable falsity of the statements in the publication. 83 F.R.D. at 585-586. However, the judge noted, "defendants have made no such showing in the case at bar." 83 F.R.D. at 586. Rather, they relied solely, and unsuccessfully, on the plaintiff's perceived burden to prove a negative.

3. The Source Disclosure Order.

The plaintiff naturally sought discovery of the sources supposedly relied upon by the defendants, in order to meet his burden of proving "actual malice." The defendents, however, withheld, concealed, or destroyed the evidence on this issue, seeking to hide behind a supposed journalistic privilege. The court rejected the defendants' stonewall position in *DeRobert v. Gannett Co., Inc.*, 507 F.Supp. 880, 884 (D.Haw. 1981), and ordered disclosure of the sources, reasoning as follows:

> "The media defendant cannot have it both ways: he cannot enjoy the protection afforded by the heavy burden imposed upon the public official plaintiff by *New York Times* and at the same time enjoy a privilege that prevents the plaintiff from obtaining the evidence necessary to carry that burden. Were the media defendant allowed to have it both ways, he would have absolute license, and the libel plaintiff would have no recourse in the courts."

The court concluded that "if defendants fail to disclose their sources within 60 days," there would be a sanction under Rule 37 of the *Federal Rules of Civil Procedure*, in that there would arise "a presumption that defendants had no sources," which presumption could be removed by disclosure of the sources within a reasonable time before trial. 507 F.Supp. at 887.

4. The Order Establishing a Presumption That There Were No Sources.

Notwithstanding the court's order to disclose, the defendants refused to divulge the identity of any sources for their stories or any evidence of their state of mind, or of their conduct in composing defamatory articles, which conduct might demonstrate reckless disregard for

the truth. Therefore, in an order dated April 12, 1982, a complete copy of which is annexed as Appendix F to this petition, the court found and determined:

> "1. That a reasonable time for disclosure of the sources in order to remove the presumption has now passed;
>
> "2. That the presumption that Mr. Uludong had no source entered by the court pursuant to the court's ruling of February 13, 1981 shall now become absolute and govern all further proceedings in this case; and
>
> "3. That defendants are hereby barred from introducing at trial any evidence that Mr. Uludong had any source for the stories giving rise to this litigation."

The order establishing a presumption that there were no sources for the defendants' libels was premised on a desire to prevent the defendants from employing the very tactics they used. On August 22, 1980, during the hearing on the plaintiff's motion to compel disclosure of sources, the plaintiff's attorney pointed out that a last minute disclosure would be insufficient, due to the prejudicial impact that it would have on the plaintiff's preparation for trial. The judge agreed, commenting that the defendants "might wait until the source dies, then tell you a little later." [C.R. 535, pp. 3-4.]

Obviously, when a reporter writes a story containing false and defamatory statements of fact attributed to anonymous "sources," but actually had no sources at all, one can draw the inference that the reporter either knew of the falsity of what he wrote or that he acted with reckless disregard for the truth. An essential element of President DeRoburt's case appeared to have been established when the court made its order on April 12,

1982, establishing a presumption that the defendants had no sources when they published their scurrilous attack on President DeRoburt.

5. The "Act of State" Digression.

Perhaps realizing the strength of the plaintiff's position on the issues of falsity, defamatory meaning, and "actual malice," the defendants found a new line of defense, the "act of state" doctrine. They argued that the federal district court could not give justice to the plaintiff because a trial of the case would necessarily involve an examination by the court of the validity, legality, or motivation of the sovereign acts of a foreign state, the Republic of Nauru.

The court granted the defendants' motion for summary judgment on the "act of state" doctrine. *DeRoburt v. Gannett Company, Inc.*, 548 F.Supp. 1370 (D.Haw. 1982). Shortly thereafter, the plaintiff moved for reconsideration and to amend his complaint so as to avoid "act of state" issues. The court denied both motions. *DeRoburt v. Gannett Company, Inc.*, 551 F.Supp. 973 (D.Haw. 1982).

The judgment in favor of the defendants based on the "act of state" doctrine was reversed on appeal in *DeRoburt v. Gannett Company, Inc.*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985). The case was then remanded back to the district court in Hawaii for a trial on the merits, although the defendants continued to maneuver in an effort to prevent any recovery by the plaintiff.

6. The Decision on "Costs."

While the appeal was still pending from the erroneous judgment based on the "act of state" doctrine, the

defendants moved for an award of attorneys' fees in an amount in excess of $473,000. *DeRoburt v. Gannett Company, Inc.*, 558 F.Supp. 1223, 1225 (D.Haw. 1983). The court granted the motion on the theory that, under Nauru law, the prevailing party in a libel action would be entitled to "costs," including attorney's fees. The court ordered that the matter would be referred to a magistrate for "determination of the actual amounts of attorney's fees and other costs." 558 F.Supp. at 1229. However, the judgment based on the "act of state" doctrine was reversed before any hearing had taken place before a magistrate, making the defendants' alleged "right" to recover "costs" moot for the time being.[2]

7. The Abrupt Reversal of the Presumption That There Were No Sources.

The order that once was "absolute" and was to "govern all further proceedings" actually had a life of about three and a half years. The order became a "paper tiger," because the judge apparently lost his nerve and failed to enforce it when the case actually moved toward a trial on the merits.

On August 2, 1985, Mr. Uludong testified in a deposition that "I'll never reveal my sources."[R.T. 2523-2524.] Nonetheless, the witness changed his position a short time later following the death, on August 17, 1985, of Mr. Ernest Milne, who had once been the Nauru

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[2]After prevailing at the trial, the defendants filed a new motion for "costs" on January 7, 1986, asking for the sum of $1,471,446.50. The district court granted the motion and again referred the matter to a magistrate for determination of the amount of "costs" to be awarded, although there has not yet been an assessment hearing before the magistrate, because of the pending appeal in the Ninth Circuit, and because of this petition for a writ of certiorari.

counsel on the Island of Saipan. On August 26, 1985, at a pre-trial conference, the defendants' counsel made an oral motion, with prior notice, to modify the order of April 12, 1982. They asserted that Mr. Uludong was now prepared to identify Mr. Milne as a source for Mr. Uludong's defamatory article. [C.R. 569, p. 1.] Previously, counsel for the plaintiff had interviewed over a hundred people in 1980, none of whom admitted to being a source for Mr. Uludong. One of those interviewed was Mr. Milne, who expressly denied being a source. [C.R. 526, p. 6.]

On September 17, 1985, the district court made an abrupt and inexplicable order revoking, in large part, the prior order establishing a presumption that there were no sources for the libel published by the defendants. The order of September 17, 1985, which came as a jolt to the plaintiff and his attorneys, is reproduced in full as Appendix G. Needless to say, the plaintiff was required to revise his entire trial strategy, seeking to discredit Mr. Uludong's purported sources, rather than relying upon an absolute presumption that there never had been any sources. The presumption on which the plaintiff had relied had proved to be a toothless discovery sanction.

8. The Trial.

The case was tried between September 18, 1985, and October 30, 1985. On November 1, 1985, the jury returned a verdict in favor of President DeRoburt on the issues of falsity and defamatory meaning as to Mr. Uludong's article, but found against the plaintiff on the issue of "actual malice." [C.R. 605.]

Since the defendants' strategy of withholding, concealing, and destroying the evidence pertaining to

their state of mind had been so successful, it is easy to understand how the plaintiff failed to prove "actual malice " to the satisfaction of the jury, although shocking new evidence came out at trial. Mr. Uludong admitted that he was under no deadline pressure when he wrote his article that was published on May 30, 1978. [R.T. 2626.] Yet, he did not seek to interview the plaintiff or even make any calls whatsoever to Nauru to check on his story before he submitted it. [R.T. 2617-2618, 2773.] He acknowledged that he held very strong personal views on the subject of the story, and had so informed his superiors. [R.T. 2439-2447, 2656.]

Mr. Addison testified that he did not know who Mr. Uludong's sources were, and had relied entirely on Mr. Uludong's article when he republished the charges that had been made. [R.T. 3188.] He acknowledged that he wrote the second story even after its charges had been denied by the Nauruan officials with whom he had spoken. [R.T. 3168, 3173.]

In a 1980 deposition, Mr. Uludong had testified that he gave his notes to his editor, John Simpson, while Mr. Simpson testified in his 1980 deposition that he had destroyed the notes to prevent their disclosure after this action was in progress. [C.R. 136, p. 6; 137.] At trial, Mr. Simpson admitted that he had destroyed the reporter's notes in 1978, for fear that they would have to be turned over in a lawsuit. [R.T. 3290.] Shortly thereafter, he said that he had "forgotten" about the fact that he sent copies to the defendants' attorneys. [R.T. 3320.] Redacted copies of the notes surfaced during the trial. [Exhibits 184A and 186A, R.T. 691 and 2751.]

Needless to say, in his testimony, Mr. Uludong relied upon alleged conversations with a person who had since

died, and the plaintiff had no way to refute Mr. Uludong's testimony, except to rely upon a rather weak jury instruction that allowed consideration of Mr. Uludong's conduct in witholding information in the evaluation of his credibility as a witness. A copy of the instruction is annexed as Appendix H.

The court granted Gannett's motion for a directed verdict at the close of all the evidence, in spite of testimony concerning the close relationship between Gannett and Guam Publications, Inc. For example, the two corporations had overlapping boards of directors [R.T. 454, 469, 3709, 3749-52, 3823-25, 3842-43], employees of the *Pacific Daily News* considered themselves to be employees of Gannett as well as of its subsidiary [R.T. 3646, 3826], Gannett had the right to control Pacific's employees and exercise that right [C.R. 622, p. 15], and key newsroom personnel could be hired or promoted only through arrangements made by Gannett [R.T. 2769-70, 3108-10, 3614-15, 3725-26]. Moreover, Gannett directly controlled *Pacific Daily News* by imposing a variety of written manuals and required procedures, which were authored and enforced by Gannett. [R.T. 3710, 3718, 3756-57.] The parent corporation also exercised a large degree of control over the content of the Guam newspaper's stories by requiring that Gannett be consulted before the local paper purchased wire service features or syndicated materials, and by providing verification or investigation of stories through the Gannett news service. [R.T. 464, 3786-90.]

In view of the jury verdict on the "actual malice" issue, and the directed verdict in favor of Gannett, judgment was entered in favor of both defendants.

9. The Cryptic Decision of the Ninth Circuit.

Plaintiff's appeal from the adverse judgment following trial was argued and submitted on April 14, 1987, and eventually decided on October 11, 1988, in an opinion reported as *DeRoburt v. Gannett Company, Inc.*, 859 F.2d 714 (9th Cir. 1988). Without citing any authorities at all, apart from the irrelevant "act of state" decision, the Ninth Circuit affirmed the judgment in a very short opinion. The appellate court asserted that "plaintiff's counsel chose to present his case in a manner inconsistent with a theory of no sources." 859 F.2d at 715. However, the court did not seem to grasp the fact that the primary error of which the plaintiff complained was the abrupt reversal of the presumption that there had been no sources, a reversal which occurred prior to trial. When the court reversed itself, the plaintiff obviously had to adapt his trial strategy accordingly, a point which apparently eluded the Ninth Circuit.

Interestingly, apparently aware of the defendants' massive claim for costs and attorney's fees, the Ninth Circuit specifically stated that these matters were not before the court. 859 F.2d at 716. Moreover, the court further directed that "any appeal to this court with respect to costs and fees be referred to this panel." 859 F.2d at 716.

One justice of the Ninth Circuit concurred with the majority opinion, but stated that:

> "If I had a second vote on the Court as constituted, I would hold that the First Amendment and *New York Times v. Sullivan*, 469 U.S. 254, 84 S.Ct. 710, 7 L.Ed.2d 686 (1964) do not preclude a two dollar judgment in favor of the plaintiff." 859 F.2d at 717.

Perhaps the concurring justice felt that a person who had vindicated himself by proving that a libel was false and defamatory should recover at least a nominal sum in spite of the absence of "actual malice." Perhaps also he felt that the defendants' enormous claim for attorney's fees and costs should be nullified without further ado.

BASIS OF FEDERAL JURISDICTION

The United States District Court for the District of Hawaii had jurisdiction based on diversity of citizenship, pursuant to 28 U.S.C. section 1332(a)(2).

ARGUMENT.

I.

The *New York Times* Case Should Be Overruled, Because It Allows Uncompensated Damage to Reputation, and Because It Creates an Artificial and Unworkable Rule of Law That Is Not Reasonably Calculated to Protect the Proper Exercise of Freedom of the Press.

In *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), in order to avoid a grave injustice in a case arising from a politically charged atmosphere, this court took the first step toward federalization of the law of defamation, drawing its authority to do so from the First Amendment. In order to prevent state and local officials from using the common law of defamation as a weapon to resist the Civil Rights Movement of the 1960's, and in light of the misuse of the law of seditious libel in the distant past, this court held that the Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280.

This court was unanimous in the *New York Times* case, although Justice Hugo Black, in his concurring opinion, observed that the court's definition of "actual malice" was "an elusive, abstract concept, hard to prove and hard to disprove." 376 U.S. at 293.

One serious problem with the "actual malice" principle was that the definition given by the court was and is inconsistent with the normal meaning of the word "malice." In *Garrison v. State of Louisiana*, 379 U.S.

64 (1964), this court observed that the definition of "actual malice" given by the lower court ("hatred, ill will or enmity or a wanton desire to injure"), hereafter referred to as "common law malice," is something entirely different from the *New York Times* definition of "actual malice." 379 U.S. at 78. Whether or not "actual malice" in the constitutional sense is a higher standard of liability than common law malice, it is certainly a different standard. In the defamation context, it appears that "actual malice" refers to the defendant's state of mind with respect to the truth or falsity of the words disseminated by him, while common law malice refers to his state of mind toward the plaintiff. This analysis is confirmed by this court's decision in *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968), in which this court squarely held that a defamation plaintiff who is a public official has the burden of proving "actual malice" and that there must be "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

In the recent case of *Harte-Hanks Communications, Inc. v. Connaughton,* ____ U.S. ____ (June 22, 1989), this court upheld a judgment in favor of a public figure, and determined that the evidence sustained the "actual malice" finding of the trial court. The evidence proving "actual malice" consisted largely of proof that the defendant failed to contact witnesses who were known to be available. The court observed that the phrase "actual malice" is confusing, in that it has "nothing to do with bad motive or ill will." ____ U.S. at ____.

Application of the "actual malice" rule of *New York Times* has proved difficult in many cases. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), for example, this court was seriously divided, producing five separate

opinions. In his concurring opinion, Justice White expressed doubt about shifting the burden of proof "from those who publish to those who are injured." 403 U.S. at 60. In his dissenting opinion, Justice Marshall suggested that limitation of damages might be a better approach to preventing injustice in defamation cases than complex rules of liability. 403 U.S. at 86-87.

Since a defamation plaintiff has been given the burden of proof on the defendant's state of mind, this court has almost inevitably held that the plaintiff is entitled to inquire into the editorial processes and individual states of mind of those persons responsible for publication of a defamatory publication. *Herbert v. Lando*, 441 U.S. 153 (1979). Speaking for the majority in *Herbert*, Justice White observed that the plaintiff's burden "is now considerably expanded," making more discovery necessary and making defamation cases "more troublesome for both plaintiffs and defendants." 441 U.S. at 176.

At least three justices of this court have become wary of the *New York Times* rationale, suggesting, or at least implying, that it should be reexamined. In *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), Justice White pointed out that plaintiffs have virtually no chance of preserving their reputations under the *New York Times* regime. 472 U.S. at 767. Although acknowledging that he had concurred in *New York Times*, Justice White made the following observations:

> "In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press.

> . . . At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served. . . .
>
> "Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds." 472 U.S. at 771, 775.

In *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 476 U.S. 1187 (1986), Chief Justice Burger, joined by Justice (now Chief Justice) Rehnquist, dissented from the denial of certiorari. The petitioner in *Coughlin* requested specifically that *New York Times* be reconsidered, and the present and future Chief Justices agreed, saying that the court should "give plenary attention to this important issue." 476 U.S. at 1187.

There has been, in recent years, a great deal of criticism of *New York Times* in the legal literature. Some commentators have suggested that it be overruled, while others would be content with major modification.

In "Was *New York Times v. Sullivan* Wrong?," 53 *University of Chicago Law Review* 782 (1986), Professor Richard A. Epstein argues that the *New York Times*

case should simply have been decided on the issue of damages. He notes that the common law rules governing defamation were developed over centuries, and were the subject of little controversy prior to 1964. He suggests that a system of strict liability, with limited damages, would be fair and reasonable. He noted that there are various reform proposals, "most of which envision the use of the declaratory judgment on truth as a supplement or alternative to the constitutional tort." 53 *University of Chicago Law Review* at 784. Professor Epstein concludes that the old law of defamation was preferable to the present system, in that it protected individual reputations and made litigation far less costly, and that it should be restored. 53 *University of Chicago Law Review* at 817-818.

The *New York Times* regime is severely criticized in a note entitled "The Overconstitutionalization of Libel Law: *Philadelphia Newspapers, Inc. v. Hepps*," 36 *De Paul Law Review* 391 (1987). In this note, it is pointed out that the defendants in a recent study of 700 libel cases involving the media won ninety percent of the time. The author concludes that the Supreme Court "has made it impossible for the libel plaintiff to vindicate his reputation." 36 *De Paul Law Review* at 411.

Even a writer who sings the praises of *New York Times* recognizes that the rule of the case has not worked successfully in practice. In "*New York Times v. Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment,' " 83 *Columbia Law Review* 603 (1983), Anthony Lewis, a columnist for the New York Times as well as a lecturer at the Harvard Law School, reviews the history of the "actual malice" rule. He suggests that:

> "Time has shown that the test does not work well enough. The court is free, and I think

obligated now, to find a new remedy." 83 *Columbia Law Review* at 624.

Perhaps the most comprehensive exposition of the practical effects of *New York Times* can be found in the thought provoking and brilliantly written book *Reckless Disregard*, by Renata Adler, a prominent writer and a graduate of the Yale Law School. Ms. Adler chronicles the history of two famous defamation actions which were litigated simultaneously in New York, both of which involved a famous general. The cases were, of course, *Westmoreland v. CBS* and *Sharon v. Time*.

In *Reckless Disregard*, Ms. Adler documents the history of two cases which, taken together, represent a shameful chapter in the history of American journalism, and an even more shameful chapter in the history of the American legal community.

General William Westmoreland of the United States Army was falsely accused in a *CBS* documentary of leading a "conspiracy" to conceal estimates about enemy troop strength in Vietnam. General Ariel Sharon of the Israeli Defense Forces was reported by *Time*, falsely as it was later established, to have discussed with Lebanon Christian leaders the need to take "revenge" on Palestinians by the massacre of several hundred of them in a refugee camp in Lebanon. Although both generals exposed media malpractice and proved defamation, neither prevailed in his New York defamation suit. Rather, both generals had to go through a burdensome litigation process. Ms. Adler commented on the attitude of the media defendants, as follows:

> "[I]t was evident that witnesses with a claim to any sort of journalistic affiliation considered themselves a class apart, by turns lofty, combative, sullen, lame, condescending, speciously pedantic, but, above all, socially and, as it were, Constitutionally arrogant,

> in a surprisingly unintelligent and uneducated way. . . . These people were, to begin with, professionals accustomed to speak with finality, never questioned except by their bosses; otherwise (in a field that, unlike, for example, true scholarship, suppresses second thoughts and confirming, or contradictory, inquiry) accustomed, in what they said or wrote, to being believed. . . . Nonetheless, they appeared before the courts not like any ordinary citizens but as though they had condescended to appear there, with their own conception of truth, of legal standards, and of what were to be the rules. As for 'serious doubt,' it seemed at times unlikely that any of these people had ever entertained one—another indication that 'serious doubt' cannot long continue as a form of 'actual malice' in the law. What was true and false also seemed, at times, a matter of almost complete indifference to them. Above all, the journalists, as witnesses, looked like people whose mind it had never crossed to be ashamed." (Page 133.)

Ms. Adler also observed that:

> "If there was a moral to be drawn from both cases, however, it seemed rather this: that received ideas, as so often upon examination in detail, happened to be wrong. The received, the right-minded, the liberal position in both cases was that the press defendants were protecting some valued and fragile Constitutional right against the assaults of whatever ideology was personified by two former military men. The reality had to do, rather, with the fragility, under the combined assault of modern newsgathering and contemporary

> litigation, of the shared sense of historic fact." (Page 225.)

Reckless Disregard shows clearly that, as long as it is not "reckless," the mass media can disseminate lies across the country and around the world with impunity. Ms. Adler traces the entire problem back to the *New York Times* case, making the following observations:

> "This problem, of an imprecisely articulated and ultimately unintelligible standard, creates instability in the law from time to time—particularly when, as in *New York Times v. Sullivan*, a fair, well-intentioned, timely, rightly decided, but not very carefully reasoned case makes a radical change in centuries of law." (Page 12.)

II.

If It Is Preserved At All, the "Actual Malice" Rule Should At Least Be Modified, Shifting the Burden of Proof to the Defendant and Limiting the Defendant's Reliance on the Purity of His State of Mind to Cases Where the Defendant Has Not Withheld, Concealed, or Destroyed Evidence Concerning That State of Mind.

Unfortunately, but not unsurprisingly in view of the current state of the law, media defendants in defamation cases resist discovery and attempt to conceal the sources of the false and defamatory information that they have disseminated. The history of the present case is a classic illustration of the situation. In their efforts to conceal the truth and cover up sloppy jounalism, the defendants often resort to claimed privilege and "shield" laws.

Generally speaking, a journalist has no right to refuse to testify with respect to confidential sources. *Branzburg*

v. Hayes, 408 U.S. 665 (1972). This rule has been applied in criminal cases (such as *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975)), as well as in civil defamation cases (such as *Laxalt v. McClatchy*, 622 F.Supp. 737 (D.Nev. 1985)).

In defamation cases, the courts have generally held that confidential sources that have been used in the preparation of an allegedly defamatory article must be revealed, so as to permit the plaintiff to establish "actual malice." *Herbert v. Lando*, 441 U.S. 153 (1979); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); and *Williams v. American Broadcasting Companies, Inc.*, 96 F.R.D. 658 (W.D. Ark. 1983). However, at least one court has recognized a qualified federal common law privilege of a journalist who refused to divulge his or her sources for a publication. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979). In *Coughlin v. Westinghouse Broadcasting and Cable, Inc.*, 780 F.2d 340 (3d Cir. 1986), the defendant relied upon a state shield law (properly, according to the appellate court), and was able to secure summary judgment because the evidence concerning "actual malice" had been successfully and legally concealed. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 1134 (1986), this court noted that the defendant had successfully relied upon a "shield" law, but did not reach the issue of whether that reliance unconstitutionally prevented the plaintiff from proving his case.

The public figure plaintiff is thus faced with a dilemma. He has the burden of proving "actual malice" by exploring, in a bitterly contested litigation process, the defendant's state of mind concerning what the defendant disseminated. However, his discovery effort is frustrated at every turn by imagined privileges and "shield" laws that have been enacted in the majority of states, attesting

to the political influence of the mass media.

In *Newton v. National Broadcasting Company, Inc.*, 109 F.R.D. 522 (D.Nev. 1985), a trial court struck an accommodation between the plaintiff's discovery rights and the defendant's rights to conceal the facts. Noting that 26 states had adopted shield laws, the court ruled that, if the defendant relied upon the law, it could not prove the "defense" of "actual malice" through witnesses whose names had been withheld. Unfortunately, the *Newton* court did not realize that "actual malice," under current law, is not a "defense," but rather an element of the plaintiff's cause of action. The proper solution to the plaintiff's dilemma is to shift the burden of proof on the issue of "actual malice," making it a defense, as it should be.

This court has held that there are "no hard and fast standards governing the allocation of the burden of proof in every situation." *Keyes v. School District No. 1*, 413 U.S. 189, 209 (1973). Rather, assigning and shifting the burden of proof on particular issues present merely questions of "policy and fairness" based on "experience" in different situations. 413 U.S. at 208. Under particular factual circumstances, it is quite appropriate to shift the burden of proof. 413 U.S. at 208-209.

Even in criminal cases, the burden of proof may be shifted so as to avoid the "serious practical handicap" that the prosecution would face if it had to "prove the negative" on an issue. *United States v. Fleischman*, 339 U.S. 349, 362 (1950). Similarly, if the evidence on an issue is peculiarly in the possession of one party, the burden of proof on that issue is typically shifted to that party. *McPhaul v. United States*, 364 U.S. 372, 379 (1960); *Campbell v. United States*, 365 U.S. 85, 96 (1961).

Where one party has "peculiar knowledge or control

of the evidence" involving proof of a negative fact, the burden rests on that party to produce the evidence and, if there is a failure to do so, "the negative will be presumed to have been established." *Allstate Finance Corporation v. Zimmerman*, 330 F.2d 740, 744 (5th Cir. 1964). *See also, Hodgson v. Hotard*, 436 F.2d 1110, 1115 (5th Cir. 1971); *International Union (UAW) v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972), and *PATCO v. Federal Labor Relations Authority*, 685 F.2d 547, 577 (D.C. Cir. 1982).

Although this court, as noted above, has clearly held that the burden of proof on the "actual malice" issue rests with the plaintiff, it has never articulated any reason why this is so. "Actual malice" is an issue involving the defendant's state of mind, and essentially involves proof of a negative fact, that the defendant did not believe what he said or published, or that the defendant did not care about its accuracy in light of what was known to him. Moreover, it is obvious that the evidence concerning a person's state of mind is within the control of that person.

It is respectfully submitted by plaintiff that, if it is not abandoned, the "actual malice" rule of *New York Times* should be modified so as to make it an affirmative defense, on which the defendant has the burden of producing evidence, and the burden of persuasion by the ordinary standard of preponderance of the evidence. Such a modification of the law would encourage media defendants to quickly reveal all the evidence concerning what they did in publishing a defamatory falsehood. Summary judgments would quickly be granted in those cases where there was no "actual malice."

In cases such as the present one, where the defendant destroyed evidence (the notes of the reporter who wrote

the defamatory story), withheld information in violation of a court order, and concealed the alleged sources of the lies that were published, the "actual malice" defense should not be allowed at all. The plaintiff suffered irrevocable prejudice when, after the death of a key witness, the defendant identified that witness as a source, but did not, even then, identify the other alleged source of the defamatory publication.

III.

The Trial Court Erred in Its Interpretation of Federal Law Governing Discovery Proceedings When It Abruptly Revoked Its Earlier Ruling Establishing a Presumption That There Were No Sources, Depriving the Plaintiff of the Only Viable Method of Proving "Actual Malice," and the Ninth Circuit Erred in Affirming the Ensuing Judgment.

In its ruling establishing a presumption that the defendants had no sources for their defamatory falsehoods, the court, in effect, adjudicated the "actual malice" issue in favor of the plaintiff, as it was authorized to do under Rule 37(b)(2). Of course, the choice of discovery sanctions is generally left to the discretion of the district court. *United States v. Westinghouse Electric Corporation*, 648 F.2d 642, 651 (9th Cir. 1981).

The courts take a very dim view of submission of false evidence. *Professional Seminar Consultants, Inc. v. Sino American Technology Exchange Council, Inc.*, 727 F.2d 1470, 1472 (9th Cir. 1984). The same is true with respect to discovery abuses which involve the "irreparable loss of material evidence." *Wyle v. R. J. Reynolds Industries, Inc.*, 709 F.2d 585, 591 (9th Cir. 1983).

An appellate court is entitled to find that a trial court

abused its discretion if it has a definite and firm conviction that the lower court committed an error of judgment in the conclusion it reached upon a weighing of the relevant factors. *United States v. Sumitomo Marine and Fire Insurance Company*, 617 F.2d 1365, 1368 (9th Cir. 1980). Given the irrevocable prejudice to the plaintiff, the abrupt reversal by the court, on the eve of trial, of the presumption that the defendants had no sources for their defamatory publication was clearly an abuse of discretion. This court has held, in the leading case on discovery abuse, that a recalcitrant litigant should not be forgiven simply because, in the future, he will feel "duly chastened" and will "comply promptly with future discovery orders of the district court." *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976).

By reversing itself at the eleventh hour, the trial court deprived the plaintiff of his right to compensation for the unjust blackening of his good name. Even worse, the court absolved the defendants of the consequences of their contemptuous stonewall strategy, by which they got away with withholding, concealing, and destroying evidence, relying at the very last minute on what was allegedly said years earlier by a man now dead. If ever there was an abuse of discretion, it was in the ruling that allowed the defendants to escape liability, and that made a mockery of the law of discovery sanctions.

IV.

The Ninth Circuit Erred in Upholding the Directed Verdict in Favor of Gannett, Since There Was Sufficient Evidence to Find That Gannett's Subsidiary, Guam Publications, Inc., and Its Individual Employees, Acted As the Agents, Servants, and Employees of the Parent Company.

It is understandable that Gannett Company, Inc., would want to absolve itself of responsibility for the falsehoods published by its subsidiary, Guam Publications, Inc. It is not understandable how the district court allowed Gannett to do so by granting a directed verdict, where there was evidence that would have supported a finding that Gannett was liable for the torts of its subsidiary. *Browne v. McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982), *cert. denied*, 461 U.S. 930 (1983); *Hawley v. Alaska Steamship Co.*, 236 F.2d 307, 309 (9th Cir. 1956).

In libel cases, a publisher is liable for the torts of its servants, whose actions are deemed to be the publisher's actions. *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 435 N.Y.S.2d 556, 416 N.E.2d 557 (1980); *Restatement 2d of Agency*, § 247; *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974); *Burns v. New York*, 6 A.D.2d 30, 174 N.Y.S.2d 192 (1958). Similarly, a subsidiary can be the agent of its parent corporation. *Pacific Can Co. v. Hewes*, 95 F.2d 42 (9th Cir. 1938); *Anglo-Eastern Bulkships v. Ameron, Inc.*, 556 F.Supp. 1198 (S.D.N.Y. 1982).

The question of whether the employees of the Pacific were also Gannett's employees is factual, as is the question of whether an agency relationship exists

between parent and subsidiary. *Pacific Can Co. v. Hewes*, 95 F.2d at 46; *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F.Supp. 831, 840 (D.Del. 1978). In light of the evidence summarized earlier in this petition, it was clearly erroneous for the trial court to take away from the jury the issue of Gannett's responsibility for the defamatory falsehoods disseminated by its subsidiary.

V.

Conclusion.

> *"Good name in man and woman, dear My Lord,*
> *Is the immediate jewel of their souls:*
> *Who steals my purse steals trash; 'tis something, nothing;*
> *'Twas mine, 'tis his and has been slave to thousands;*
> *But he that filches from me my good name*
> *Robs me of that which not enriches him*
> *And makes me poor indeed."*[1]

This court should restore to President DeRoburt his good name, by ordering compensation for the libelous falsehoods published by the defendants. The Constitution of the United States does not preclude justice for persons whose reputations have been sullied by journalists indifferent to the truth.

It is respectfully submitted that the Supreme Court of the United States should grant this petition, in order

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[1]This passage from William Shakespeare's *Othello* (Act III, scene 3) is quoted in *Botos v. Los Angeles County Bar Association*, 151 Cal.App.3d 1083, 1087 (1984), a defamation action brought by an attorney.

to consider the issues presented and, thereafter, should remand the cause for a trial on damages, so that the plaintiff may be justly compensated.

Respectfully submitted,

HAIGHT, BROWN & BONESTEEL
Roy G. Weatherup,
Morton G. Rosen, and
Thomas N. Charchut

Attorneys for Petitioner
HAMMER DeROBURT

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAMMER DeROBURT,
Plaintiff-Appellant,
v.
GANNETT CO., INC., a Delaware corporation, and GUAM PUBLICATIONS, INC., a Hawaii corporation, both dba PACIFIC DAILY NEWS,
Defendants-Appellees.

No. 85-2888
D.C. No.
CV 78-375-SPK
OPINION

Appeal from the United States District Court
for the District of Hawaii
Samuel P. King, District Judge, Presiding

Argued and Submitted
April 14, 1987—San Francisco, California

Filed October 11, 1988

Before: Richard H. Chambers, Joseph T. Sneed and Edward Leavy,* Circuit Judges.

Per Curiam; Chambers concurring

*Judge Leavy was drawn to replace Judge Anderson now deceased. He has read the briefs, reviewed the record, and listened to the tapes of oral argument held April 14, 1987.

APPENDIX A

SUMMARY

Courts and Procedure

Affirming judgment, the court held that there was no failure to give a requested jury instruction.

The case was previously before the court in *DeRoburt v. Gannett Co., Inc.*, 733 F.2d 701, *cert. denied*, 469 U.S. 1159. On remand the district court directed a verdict for the defendant Gannett and a jury found for defendant Guam Publications.

[1] Plaintiff Hammer DeRoburt contends that failure to give a jury instruction constitutes error. Defendants claimed a lack of constitutional malice in that there were credible sources of information for the published material. The news reporter, Francisco Uludong, who is not a defendant, claimed a constitutional privilege against disclosure. The district court entered an order which provided that because of defendants' recalcitrance, defendants could not assert or attempt to prove the existence of any sources and that the jury would be instructed that it must presume there were none. **[2]** The record supports the defendants' contention that before and during trial, plaintiff's counsel chose to present his case in a manner inconsistent with a theory of no sources.

Concurring, Circuit Judge Chambers states that while this court has upheld a right in *DeRoburt* in its first opinion, exempting DeRoburt from the law of the Act of State doctrine, this court has reached the outer limit in exempting rulers from the Act of State, *and* the Supreme Court has denied certiorari which makes "Round One" the law of the case.

COUNSEL

Morton G. Rosen, Haight, Brown & Bonesteel, Santa Monica, California, for the plaintiff-appellant.

John B. McCrory, Nixon, Hargrave, Devans & Doyle, Washington, D.C., for the defendants-appellees.

OPINION

PER CURIAM:

This is a diversity liability action brought by Hammer DeRoburt, President of the Independent Republic of Nauru. Defendants are Gannett and its wholly owned subsidiary Guam Publications, Inc., publisher of Pacific Daily News.

The case was previously before us in *DeRoburt v. Gannett Co., Inc.*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (error for trial judge to deny motion for reconsideration where plaintiff's fourth amended complaint only minimally intruded into events involving the act of state doctrine). On remand the district court directed a verdict for the defendant Gannett and a jury found for defendant Guam Publications.

[1] Plaintiff first contends that failure to give a jury instruction constitutes error. Defendants claimed a lack of constitutional malice in that there were credible sources of information for the published material. In the course of discovery, and contrary to the court's order, the defendants failed to disclose the sources of the publication. The news reporter, Francisco Uludong, who is not a defendant, claimed a constitutional privilege against disclosure. In 1982 the district court entered an order which provided that because of defendants' recalcitrance, defendants could not assert or attempt to

prove the existence of any sources and that the jury would be instructed that it must presume there were none. The district court did not give that instruction.

The district court's original decision to instruct the jury that it must presume there were no sources was a sanctioning device. The initial article authored by Uludong was attributed to undisclosed sources. The record shows Uludong did not promptly disclose the sources to his employer, defendants Pacific Daily News, or to defense counsel. Approximately a month before the trial, plaintiff's trial counsel informed the defendant that one of the sources had died. Defense counsel was able to confirm that fact through the news reporter and confirmed the identity of the source. A few days before trial plaintiff's counsel claimed he knew the identity of the other source.

[2] The record supports the defendant's contention that before and during trial, plaintiff's counsel chose to present his case in a manner inconsistent with a theory of no sources. In fact, the plaintiff himself introduced evidence at trial concerning the existence of and identities of the claimed sources, the defendant's refusal to disclose, and the circumstances of the defendant's ultimate confirmation of knowledge gained by the plaintiff through other means. The news reporter testified that Jerry Kramer was one of the sources. Plaintiff called Jerry Kramer who denied being a source. The jury apparently chose to believe the news reporter. Plaintiff did not request an instruction as contemplated by the court's earlier order. The court instructed the jury as follows:

> In preparing the May 30, 1978 article that appeared in the Pacific Daily News, Cisco Uludong has testified in depositions and at this

> trial that he relied on two confidential sources. Contrary to this court's orders, defendant Guam Publications, Inc., and Cisco Uludong, until less than a month before trial, refused to reveal the identity of either of those sources. Mr. Uludong has now testifed in this trial that one of those sources was Ernest Milne, who died shortly before Mr. Uludong decided to reveal that name as a source, and that the other source was Jerry Kramer. Because of Mr. Uludong's long delay in revealing his claimed sources and because of other circumstances surrounding his and defendant's earlier failure to identify these sources, about which you have received evidence, you may consider that delay and those facts and circumstances in evaluating Mr. Uludong's credibility as a witness. The effect that these considerations may have upon your evaluation of Mr. Uludong's credibility, and the weight you shall give to these circumstances, are entirely within your province to decide as judges of the facts and of the weight and effect of the evidence.

For the district court judge to then instruct the jury that it should conclusively presume that there were no sources would have been contrary to the evidence presented at trial by both parties and contrary to the truth.

Plaintiff next contends that it was error to direct a verdict in favor of defendant Gannett. Plaintiff had argued that Gannett, the parent company of defendant Guam Publications, could be liable under respondeat superior or agency theories. The district court judge held that there was no evidence in the record to justify going

to the jury under either theory. We have been directed to nothing in the record which would support plaintiff's claims. We agree with the district court judge. Furthermore, since we conclude that defendant Guam Publications is not liable, the question of Gannett's vicarious liability is purely academic.

The matter of costs and attorneys' fees is not before us at this time. We direct that any appeal to this court with respect to costs and fees be referred to this panel. The judgment of the district court is affirmed.

CHAMBERS, Circuit Judge, concurring:

Here we have a sequel to our *DeRoburt v. Gannett Co., Inc.*, 733 F.2d 701 (1984).

I wish to make some comment on the accused newspaper stories that made this case. The reporter was the first small Pacific Islands native to be hired by a paper or papers with a large circulation. He had been apparently indoctrinated on the glories of our First Amendment, and the reporter's duty to even go to jail to protect his sources.

To me, it is the headlines, surely not written by the reporter Uludong, that made the litigation we have here.

It bears down on the Marshall Islands on the legality of the "loan" according to the Marshall Islands' laws. It seems to me the laws of Nauru were much more important. For example I suppose that each dollar sent by our government to the Contras offends the laws of Nicaragua under the Sandinistas.

My point is that while we have upheld a right in *DeRoburt* in our first opinion, exempting DeRoburt from the law of the "Act of State" doctrine, we have

reached the outer limit in exempting rulers from the "Act of State", *and* the Supreme Court has denied certiorari, *Gannett Co., Inc., et al., v. DeRoburt,* 469 U.S. 1159, which makes "Round One" the law of the case, I think.

By saying the above, I do not mean to say our first opinion was an aberration. I think it will fit a few other cases as they arise, but only a few.

This may be getting ahead too early, but considering the whole record, the jury did find on interrogatories that the news story was false, but found no malice. We can find no fault with conclusions of the jury, and the parties do not argue here against the findings.

If I had a second vote on the Court as constituted, I would hold that the First Amendment and *New York Times v. Sullivan,* 370 U.S. 254, do not preclude a two dollar judgment in favor of the plaintiff.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAMMER DeROBURT, Plaintiff-Appellant, v. GANNETT CO., INC., a Delaware corporation, and GUAM PUBLICATIONS, INC., a Hawaii corporation, both dba PACIFIC DAILY NEWS, Defendants-Appellees.	No. 85-2888 D.C. No. CV 78-375-SPK ORDER

Before: CHAMBERS, SNEED, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Leavy has voted to reject the suggestion for rehearing en banc, and Judges Chambers and Sneed have so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

CONSTITUTIONAL AND OTHER PROVISIONS

In relevant part, the First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." The Fourteenth Amendment, as it pertains to this case, mandates that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

In pertinent part, Rule 37(b)(2) of the *Federal Rules of Civil Procedure* provides that "if any party fails to obey an order . . ., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: (A) an order that the matters regarding which the order was made or any other designated fact shall be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order; (B) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence."

PACIFIC DAILY NEWS
A Gannett Newspaper

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WHERE AMERICA'S DAY BEGINS

VOL. 9 No. 118 AGANA, GUAM
TUESDAY, MAY 30, 1978

Marshalls Separatist Movement Gets Secret Funds From Nauru

By Cisco Uludong
Daily News Staff

SAIPAN — The Republic of Nauru secretly is backing the separation of the Marshalls from Micronesia.

The phosphate-rich country has loaned thousands of dollars to finance a campaign by the Marshalls Political Status Commission, which supports separation, to reject the proposed Micronesian constitution, according to reliable sources in the Trust Territory.

Another loan from Nauru to the Marshalls in 1974 was ruled illegal by T.T. officials.

Sources say that shortly after his re-election earlier this month, Nauru President Hammer Deroburt, a personal friend of Congress of Micronesia Sen. Amata Kabua, gave the separatists $600,00 of the $1 million they originally requested.

Kabua is chairman of the status commission.

The loan's terms and conditions are not generally known and few people in the Marshalls are aware of it, sources said.

The sources said Marshallese separatist leaders had earlier approached Deroburt's predecessors about the loan but were politely turned down because Nauru

officials did not want to be accused of "meddling" in Micronesia's internal affairs.

The Marshallese renewed their request to Deroburt after he took office. He approved it and flew to the Marshalls to personally deliver the check, sources said.

This is not the first time that Nauru has loaned money to the Marshallese. In 1974 Deroburt loaned $600,000 to the Marshall Islands Development Authority to build a copra plant and construct some docks. That loan was ruled illegal by the T.T. Attorney General's Office.

Nauru, whose people resemble Marshallese, has more at stake in the district than ethnic affinity. In an interview with the Daily News last April, Deroburt said the Nauru local government council, which he heads, already has $5 million in business investments in the Marshalls.

Before the commission received the $600,000 illegal loan, the Marshalls Legislature tried on two occasions earlier this year to go around existing attorney general laws and rulings barring the T.T. district legislatures and their creatures from borrowing money.

The first attempt gave the commission blanket authorization to borrow money but the legislation was vetoed by Marshalls District Admininstrator Oscar Debrum on instructions from the T.T. attorney general.

The second attempt, which trimmed down the authorization to no more than 50 percent of all revenues collected by the Marshalls Legislature in 1977, was also vetoed by Debrum on orders from Saipan.

"He (Debrum) was advised that the position of the attorney general has not changed — that the legislatures and their creatures do not have the power to borrow money," said Scotte Stege, T.T. assistant attorney general.

Commenting on the $600,000 loan, acting Attorney General Rod Johnson said: "The district administrator knows our position and we hope that he would prevent any repayment of the loan with public funds."

PACIFIC DAILY NEWS,
Thursday, June 29, 1978

Nauru Officials
Admit Lending
Separatists' Loan

By Paul Addison
Daily News Staff

NAURU — The Republic of Nauru Finance Corp. made a loan recently to persons in the Marshall Islands but senior Nauruan officials are unwilling to say to whom the loan was made or for how much.

Nauruan officials reacted angrily to a May 30 Daily News article that said the phosphate-rich republic secretly was backing the separation of the Marshalls from Micronesia.

President Hammer Deroburt's chief secretary, Peter Jones, admitted a loan had been made but added: "We've no obligation to tell you who to or for how much." Nauruan Secretary for Justice David Lang said, "As far as we're concerned, it's not a secret loan. It's a straightforward loan."

Lang said the Republic of Nauru Finance Corp. was a separate statutory company not connected to the government. Deroburt is not a member of the company's board, Lang said.

Although Lang and Jones said the Daily News article was "a distortion of the truth," they refused to answer any questions about the loan.

Four inquiries to interview Deroburt brought no response from the president.

Sources have said that shortly after his re-election in early May, Deroburt flew to the Marshalls to deliver

the separatist Marshalls Political Status Commission a $600,000 check.

Nauru has extensive business investments in the Marshalls and made loans previously to the Trust Territory district to build a copra plant and docks.

Nauruan investment and loans abroad are not new. With less than 15 years before all the island's phosphate is scheduled to be mined, most families are investing their money in nest eggs overseas.

The Nauruan government also has built a $7 million complex in Saipan and a 53-story office building in Melbourne, Australia.

Concern about the future is the dominant island issue and has been partly responsible for major political changes this year and last.

The well-respected Deroburt, who was largely responsible for securing political independence for Nauru in 1968, was ousted as president in January 1977 by a young group of educated Nauruans led by former law student Bernard Dowiyogo.

Dowiyogo resigned in April after his budget failed to win government support.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

APR 12 1982

HAMMER DeROBURT,

Plaintiff,

vs.

GANNETT CO., INC., a Delaware corporation, and GUAM PUBLICATIONS, INC., a Hawaii corporation, both dba PACIFIC DAILY NEWS,

Defendants.

SECOND PRETRIAL ORDER

This matter having come on for Pretrial Conference before the Court February 19, 1982, with Plaintiff having been represented by George M. Allen, A. Bernard Bays and Stacey J. Hendrickson, and Defendants having been represented by David J. Dezzani and John Rapp, and the Court having considered the Pretrial Statements filed by the parties, having heard the statements of counsel, and being fully advised in the premises, hereby finds and orders:

I. Plaintiff's Expert Witnesses.

Plaintiff has submitted an Offer of Proof regarding identification and summaries of testimony of certain expert witnesses. The Court has not fully considered this matter and it is deferred to consideration at a later point in time.

II. Order From December 17, 1981 Pretrial Conference.

The Court and counsel reviewed the conflicting proposed Orders for the December 17, 1981 Pretrial Conference and the Court resolved conflicting language. A record of the proceedings of the Court in so doing was made. The Court assigned the task of preparation of a conforming Order to counsel for Defendants.

III. Discovery Matters Not Dealt with in First Pretrial Order (Regarding December 17, 1981 Pretrial Conference).

The Court notes that Plaintiff's counsel has requested that one trial subpoena, previously served on Richard Copaken, be continued to the new trial date, as the trial subpoena was served on Mr. Copaken at a time when trial of this matter was scheduled for February, 1982. The Court also notes that Mr. Copaken's counsel has moved to quash the trial subpoena. Plaintiff has requested that Mr. Copaken's trial subpoena be continued to the new trial date of August 10, 1982, subject to Mr. Copaken's motion to quash the subpoena. It is so ordered.

IV. Issues of Law.

A. Ruling Regarding Evidence of Source.

As noted under heading III of the First Pretrial Order, the Court noted that at the December 17, 1981 Pretrial Conference counsel for Defendants stated that Defendants are now in possession of copies of the notes which indicate the identity of the source or sources for the stories giving rise to this litigation, notwithstanding prior testimony by employees of Defendants that the original of such notes had been lost and copies of those notes destroyed. The Court further noted that counsel for

Defendants stated that Defendants continue to take the position that such information should not be disclosed and, accordingly, that Defendants would not disclose such information nor would they produce the copies of the said notes. The Court then advised counsel for Defendants to make a filing with the Court formally advising the Court and opposing counsel of the fact that copies of such notes were in existence and in the possession of Defendants and their counsel. At that time, counsel for Plaintiff, Mr. Allen, stated that Plaintiff continued to take the position that such materials should be produced to Plaintiff's counsel.

On February 2, 1982, an "Amended Response to First Set of Interrogatories Propounded by Plaintiff to Defendant Guam Publications, Inc." was filed herein. The amended response indicated that defendants' attorneys are in possession of a memorandum from Cisco Uludong to John Simpson, dated September 29, 1978, and copies of Uludong's notes.

The Court notes that Defendants have consistently refused to disclose the sources throughout this litigation, despite repeated and varied attempts by Plaintiff to discover the identity of the sources, which attempts have been made known to this Court and placed in the record of this litigation.

The Court notes that on February 13, 1981, following extensive briefing and argument, the Court entered an order compelling Defendants to disclose the sources. The Court ordered specifically:

> Accordingly, it is hereby ordered that the plaintiff's motion to compel disclosure of sources is granted; that defendants are compelled to disclose their sources for the two news stories that are the subject of this libel suit;

> and that if defendants fail to disclose their sources within 60 days, there shall arise a presumption that defendants had no sources, which presumption may be removed by disclosure of the sources within a reasonable time before trial.

The Defendants did not disclose the sources within the time period established by this Court's order, as extended by stipulation of the parties. For the first time, at the December 17, 1981 conference, Defendants' counsel revealed that he had come into possession of notes identifying the source or sources; Defendants, however, persisted in their refusal to disclose the sources.

Plaintiff now asks this Court to rule:

> (a) that any reasonable time for disclosure of the sources in order to remove the presumption has now passed;
>
> (b) that the presumption that Mr. Uludong had no sources shall become absolute and govern all further proceedings in this case; and
>
> (d) that Defendants be barred from introducing at trial any evidence that Mr. Uludong had any source for the stories giving rise to this litigation.

The Court is satisfied that the position of Defendants on the source issue has been consistent since the beginning of this litigation; namely, one of refusal, as a matter of constitutional principle and privilege, to disclose the identity of the sources. Under all of the circumstances, the Court believes that there would be substantial prejudice to Plaintiff if Defendants are allowed to revive the source issue after their refusal to disclose the identity of the sources.

The Court notes Defendants' objections to the requested ruling and further notes that Defendants are not barred from filing a motion for reconsideration of the Court's findings and order should they so desire.

Therefore, the Court hereby finds and orders:

1. That a reasonable time for disclosure of the sources in order to remove the presumption has now passed;

2. That the presumption that Mr. Uludong had no source entered by the Court pursuant to the Court's ruling of February 13, 1981 shall now become absolute and govern all further proceedings in this case; and

3. That Defendants are hereby barred from introducing at trial any evidence that Mr. Uludong had any source for the stories giving rise to this litigation.

B. Additional Issues of Law.

The parties indicated in their pretrial memoranda that additional issues of law will be presented to the Court by way of motion. They are advised that such motions should be filed and calendared for determination by the Court in the regular manner.

V. Further Pretrial Conference.

Another pretrial conference is scheduled for 9:00 a.m., Tuesday, May 11, 1982, with the Court in Honolulu.

DATED: Honolulu, Hawaii, April 12, 1982.

Samuel P. King
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 78-0375

Filed in the
United States District Court
District of Hawaii
SEP 17 1985
Walter A. Y. H. Chinn, Clerk

HAMMER DeROBURT,

Plaintiff,

vs.

GANNETT CO., INC., et al.,

Defendants.

ORDER REGARDING
SOURCE RESUMPTION

By pretrial order of April 12, 1982, this Court held that Mr. Uludong's continued refusal to reveal the identities of his claimed sources had given rise to an absolute presumption that no such sources existed.

On August 28, 1985, defendants moved this Court to modify that ruling on the grounds that due to the death of one of his claimed sources on August 17, 1985, Mr. Uludong was willing to reveal the identity of that sources, designated by the parties as "Source A."

At pretrial hearing on September 3, 1985, the Court indicated that it was inclined to modify its previous ruling so as to make the "no source" presumption a rebuttable one if Mr. Uludong revealed the identity of his sources. In this regard, the Court submitted to the parties a

proposed jury instruction, attached to this order as Appendix A.

On September 6, 1985, defendants filed with the Court an affidavit of Mr. Uludong in which Mr. Uludong revealed as his claimed deceased source, a Mr. Ernest Milne. Defendants still refuse to reveal the identity of Mr. Uludong's second claimed source, "Source B."

On September 10, 1985, plaintiff moved this Court to prevent defendants from either (1) referring to or introducing evidence of Mr. Milne unless defendants also reveal the identity of "Source B", or (2) referring to or introducing evidence of "Source B" unless defendants reveal the identity of the same. During pretrial hearing on September 17, 1985, plaintiff further asked the Court to order defendants' counsel to turn over documents within their control and which contain the name of "Source B."

The Court is mindful of the competing considerations involved in a decision such as this one. On the one hand, a libel plaintiff needs to establish defendant's state of mind with regard to the publication in issue, but evidence crucial to that determination is typically within the defendant's control. On the other hand, traditional sanctions for contempt have proved ineffective to deal with media defendants' refusals to reveal confidential sources. While the Court finds defendants have no legally recognized claim to a so-called "news reporter's privilege," the Court also recognizes that an appropriate sanction, especially one touching upon a refusal to speak, should be remedial, rather than punitive in nature. It is the opinion of the Court that use of a presumption best acounts for the competing concerns.

By revealing the identity of "Source A" only on the eve of trial, defendants have restricted plaintiff's ability

to discover matter pertinent to his case. In particular, plaintiff is foreclosed from deposing a source who is now deceased. Nevertheless, defendants have indeed identified "Source A," and plaintiff has had some opportunity to prepare his response. In view of these changed circumstances, the Court finds that modification of its April 12, 1982 pretrial order is appropriate.

Therefore, IT IS HEREBY ORDERED that defendants may introduce appropriate evidence of Mr. Milne as a claimed source. If requested by plaintiff, the Court will consider instructing the jury that they may consider the circumstances of defendants' revelation of "Source A" as (1) bearing upon the credibility of Mr. Uludong, or (2) giving rise to a rebuttable presumption that the revealed source was not as represented by defendants.

However, defendants still refuse to identify "Source B," thus frustrating plaintiff's attempt to respond to claims of a second source.

Therefore, IT IS HEREBY FURTHER ORDERED that defendants may not refer to or introduce evidence of a "Source B." Plaintiff may, but need not, introduce evidence that Mr. Uludong claims a second source whom he and defendants refuse to identify. Such evidence may be made the basis for a presumption that there was no such source.

Dated: Honolulu, Hawaii, September 17, 1985

Samuel P. King
United States District Judge

JURY INSTRUCTION

In preparing the May 30, 1978 article, reporter Cisco Uludong claims reliance on two sources. Contrary to this court's order, Mr. Uludong had originally refused to reveal the identity of either of his sources, claiming that journalistic principles prohibited him from doing so. Mr. Uludong now claims that one of his sources has died and he is therefore willing to reveal the identity of that source. Mr. Uludong still refuses to name his other claimed source.

I instruct you that because of Mr. Uludong's long delay in revealing one of his claimed sources and his continued refusal to disclose the other, a presumption arises that he had no such sources. If, in your judgment, the defendant or defendants have introduced no evidence that tends to contradict the presumption, then you must take that presumption as being true. That means that the presumption is controlling in the absence of any evidence to the contrary that you find credible. The presumption may, however, be rebutted or overcome by the defendants.

Should you conclude that defendants have introduced evidence contradicing (sic) the presumption, it is for you to determine whether such evidence has the weight and value necessary for you to conclude that the presumption has been overcome by a preponderance of the evidence. If you find that the presumption has not been rebutted, and you therefore conclude in accordance with these instructions that Mr. Uludong did not have the claimed sources, you may treat that conclusion as evidence of knowledge of falsity or reckless disregard of falsity. If you find that the presumption has been overcome, then it shall have no effect, and it may be disregarded by

you. Nevertheless you must still determine, viewing the evidence as a whole, whether or not the article was published with knowledge of falsity or reckless disregard of falsity.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 30, 1989, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(By Express Mail:
original and forty copies)

Clerk, United States Court
of Appeals
Ninth Judicial Circuit
Seventh and Mission Streets
San Francisco, California 94101

Clerk, United States District
Court for the Hon. Samuel P. King
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Attorneys for Appellees

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 30, 1989, at Los Angeles, California.

Betty J. Malloy
(Original signed)